IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, *et al.* Plaintiffs, vs. TYSON FOODS, INC., *et al.* Defendants.	Case No. 05CV0329-GKF-PJC

DEFENDANTS' JOINT MOTION *IN LIMINE* TO EXCLUDE REFERENCES TO TRADE ORGANIZATIONS OR ORGANIZATIONAL DOCUMENTS, COMMUNICATIONS, SEMINARS, OR MEETINGS WITHOUT SPECIFIC EVIDENCE THAT ALL DEFENDANTS WERE MEMBERS, ATTENDED, OR RECEIVED SUCH DOCUMENTS OR COMMUNICATION

Plaintiffs' experts and lay witnesses, and Plaintiffs through their pleadings and filings, have indicated their intention to make references to and present other evidence of the activities of trade organizations or organizational documents, communications, seminars or meetings without any specific evidence that all of Defendants attended such seminars or meetings, received such documents or communications, or were even members of the trade organization. Accordingly, Defendants respectfully file this Joint Motion *in limine* to exclude references to trade organizations or organizational documents, communications, seminars or meetings without specific evidence that all Defendants were members, attended such seminars or meetings, and received such documents or communication.

SUMMARY FACTS

As set out in *Defendants' Motion for Partial Summary Judgment Dismissing Counts 1, 2, 3, 4, 5, 6 and 10 Due to Lack of Defendant-Specific Causation and Dismissing Claims of Joint and Several Liability under Counts 4, 6 and 10*, Dkt. No. 2069, at 1-4 (May 18, 2009)

("Causation Motion"), Plaintiffs have made clear their intention to try this case on an industry-wide basis. *See e.g. Plaintiffs' Motion for Partial Summary Judgment*, Dkt. No. 2062, at 24 (¶48), 29 (¶c), (May 18, 2009) (alleging erroneously that some of Plaintiffs' claims have been "confirmed by a multitude of sources, including…Defendants, Defendants' retained experts and Defendants' trade associations.")

In this regard, Plaintiffs' evidence of causation and claims of injury turn on undifferentiated allegations of poultry litter application and injuries to waters in the IRW (and elsewhere), but with no specific evidence tying any of these instances to any particular Defendant. *Id.* Instead, Plaintiffs' contend, *inter alia*, that materials presented or statements made by trade organizations – including The Poultry Federation and the U.S. Poultry & Egg Association – somehow constitute "knowledge" held or "admissions" made by each Defendant, whether or not the Defendant was a member of the organization, adopted and authorized the statement, or was even aware of the statement. *See e.g.* Deposition of Benny McClure, August 15, 2007 at 101:13 – 102:1 (stating that Defendant George's, Inc., had not been a member of The Poultry Federation "for years").

Plaintiffs have not secured a defendant class. Therefore, each individual Defendant has a right to insist that any liability be proven by evidence specifically demonstrating each particular Defendant's responsibility. *See, e.g., Doe v. Cassel*, 403 F.3d 986, 988 (8th Cir. 2005) (motion to dismiss properly granted as to an amended complaint for alleging collective misconduct and not differentiating acts and omissions between individual defendants). As to numerous points to be proved at trial, Plaintiffs must present evidence specific to each individual Defendant. Each Defendant is a separate corporate entity with different facilities, operations, and activities. Each Defendant contracts with different independent contract producers ("contract growers"), pursuant

to different agreements and has different business practices. Likewise, each Defendant maintains a separate status vis-à-vis any particular trade organization. Plaintiffs' proof based upon trade organization activities does not apply to each company equally – not all Defendants were even members of any particular trade organization at the time of the organization's subject activity. *See e.g.* Deposition of Benny McClure, August 15, 2007 at 101:13 – 102:1 (stating that Defendant George's, Inc., had not been a member of The Poultry Federation "for years").

For these and other reasons, Plaintiffs' generalized attribution of evidence, including evidence that trade organizations have spoken for or do speak for all Defendants, is insufficient to meet Plaintiffs' burden to prove elements such as causation and injury against each Defendant individually. *See* Causation Mot. at 16-21 (setting out legal basis requiring Plaintiffs to show individualized proof as to each Defendant); s*ee also, e.g., Schneiderman v. United States*, 320 U.S. 118, 147, 63 S.Ct. 1333, 87 L.Ed. 1796 (1943) (Court's noting that "The Government frankly concedes that 'it is normally true *** that it is unsound to impute to an organization the views expressed in the writings of all its members, or to *impute such writings to each member* ***.'") (emphasis added).

DISCUSSION

Because Plaintiffs bear the burden of proving their case as to each individual Defendant, it would be improper of them to make generalized references to, or present other evidence of, the activities of trade organizations or organizational documents, communications, seminars or meetings without any specific evidence that all of Defendants attended such seminars or meetings, received such documents or communications, or were members of the trade organization. Unless it can be established that any activities of a non-party trade organization were participated in, authorized by, adopted by, and performed on behalf of Defendants (as

members), evidence of the activities of a trade organization would be irrelevant under Rule 402 and, alternatively, would be unfairly prejudicial, confusing, and misleading under Rule 403. *See e.g. United States v. Robel*, 389 U.S. 258, 266 (ft. 16), 88 S.Ct. 419, 19 L.Ed.2d 508 (1967) (Court's observing that "A number of complex motivations may impel an individual to align himself with a particular organization. . . .[and] the mere presence of an individual's name on an organization's membership rolls is insufficient to impute to him the organization's [activities].")

I. Unsupported References to Trade Organization Activities and Documents Are Irrelevant Under Federal Rule of Evidence 402

Rule 402 establishes the baseline rule that relevant evidence is generally admissible, while irrelevant evidence is always inadmissible. Fed. R. Evid. 402 ("Evidence which is not relevant is inadmissible."). To the extent that previously admitted evidence has not already established that a particular activity or document of a non-party trade organization may be imputed to each Defendant, then references to the trade organization's activities would invite the trier-of-fact to speculate as to the applicability of the activity to, and potentially the liability of, all of those Defendants not implicated by specific proof.

By way of illustration, evidence regarding the presentation and content of seminars sponsored by the U.S. Poultry & Egg Association is surely irrelevant if offered for purposes of establishing that the seminars (and their content) are authorized by, imputed to, and binding upon all of Defendants, particularly considering not all of Defendants were in attendance at all seminars. *See e.g.* Deposition of Monty Henderson, August 20, 2008 at 23:5 – 10 (explaining that, while in the past he went to seminars sponsored by U.S. Poultry & Egg Association, "it's been a few years since" he had last attended).

II. Unsupported References to Trade Organization Activities and Documents Would be Unfairly Prejudicial, Would Confuse the Evidence, and Would be Misleading Under Federal Rule of Evidence 403

As set forth in the Causation Motion, Plaintiffs must prove causation against each individual Defendant. *See, e.g., McKellips v. St. Francis Hospital, Inc.*, 741 P.2d 467, 470 (Okla. 1987); *Woolard v. JLG Indus.*, 210 F.3d 1158, 1172 (10th Cir. 2000); *City of St. Louis v. Benjamin Moore & Co.*, 226 S.W.3d 110, 114 (Mo. 2007).

> In all tort cases, the plaintiff must prove that *each defendant's conduct was an actual cause*, also known as cause-in-fact, of the plaintiff's injury: Any attempt to find liability absent actual causation is an attempt to connect the defendant with an injury or event that the defendant had nothing to do with. Mere logic and common sense dictates that there be some causal relationship between the defendant's conduct and the injury or event….

Id., at 113-14 (emphasis added); *see also Attorney General of Okla. v. Tyson Foods, Inc.*, 565 F.3d 769, 776-78 (10th Cir. 2009); *Wood v. Eli Lilly & Co.*, 38 F.3d 510, 512-13 (10th Cir. 1994) (finding Oklahoma has not and would not adopt alternative, collective or non-identification theories of liability); *Case v. Fibreboard Corp.*, 743 P.2d 1062, 1067 (Okla. 1987) (same). Meeting this burden requires proof against each Defendant individually, not all Defendants collectively, and certainly not all Defendants through the activities or documents of a non-party trade organization.

The finder-of-fact will have to track carefully what proof, if any, has been submitted against each Defendant on each relevant point. Permitting Plaintiffs to present evidence in summary and collective fashion, particularly through proof of activities of a non-party trade organization which may or may not be acting or speaking with the authority or knowledge of all Defendants, would be improper. Plaintiffs must first establish, for any activity performed by a trade organization, that each Defendant to whom the Plaintiffs seek to impute conduct authorized the activity to be performed on its behalf, before suggesting that the organization was acting on

behalf of any Defendants in engaging in the conduct. In the absence of such a foundation, evidence of a non-party trade organization's activities is an improper effort to superimpose the organization's activities onto all Defendants collectively.

Courts facing similar circumstances have properly prevented a party from making generalized references aggregating similarly situated groups of defendants. *See, e.g., United States v. Edwards*, 159 F.3d 1117, 1127 (8th Cir. 1998) (holding that the district court was "appropriately cautious" in allowing clarification of "the number of people referred to by a plural pronoun, to negate any inference it might refer to all defendants."). In *United States v. Robel*, 389 U.S. 258, 88 S.Ct. 419, 19 L.Ed.2d 508 (1967), the Supreme Court recognized that "the mere presence" of a person's name on an organization's membership rolls is insufficient to impute to the person the organization's conduct. *See Robel* at 266, ft. 16; *see also Bridges v. Wixon*, 326 U.S. 135, 163 65 S.Ct. 1443, 89 L.Ed. 2103 (1945) (Court's discussing the "traditional American doctrine requiring personal guilt rather than guilt by association or imputation before a penalty…is inflicted.")

Any attempt by Plaintiffs to suggest a non-party trade organization, such as The Poultry Federation or U.S. Poultry & Egg Association, acts on behalf of all Defendants – and effectively to circumvent Plaintiffs' burden of proving each Defendant's conduct proximately caused any claimed injury – would be improper and should be prohibited. Likewise, any reference to the activities of a trade organization, without regard to Defendants' participation in, authorization of, and adoption of the activities, is an effort to avoid Plaintiffs' burden of proof and is inappropriate. Such references by Plaintiffs are not relevant and would constitute unfairly prejudicial, misleading, and confusing evidence that would substantially outweigh any slight probative value the references might have.

CONCLUSION

For these reasons, references to trade organizations or organizational documents, communications, seminars or meetings without specific evidence that all Defendants were members, attended such seminars or meetings, or received such documents or communications would unfairly characterize each Defendant with evidence attributable to only one, some, or even none of Defendants, thereby confusing the evidence, misleading the trier-of-fact, and prejudicing all Defendants. Rather than face constant objections at trial, the better course is to require Plaintiffs *ex ante* to make no references to activities of non-party trade organizations, certainly without first developing a proper foundation.

Respectfully submitted,

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